Supreme Court, U.S.
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No. 03-

In the Supreme Court of the United States

MOUNTAIN ENTERPRISES, INC.,

Petitioner,

v.

DANIEL R. FITCH AND GREGORY ADAM PLUMLEY, CO-ADMINISTRATORS OF THE ESTATES OF TYLER FITCH AND HARLEY FITCH, DECEASED, DANIEL R. FITCH, INDIVIDUALLY, JERRY GALLOWAY, INDIVIDUALLY AND D/B/A GALLOWAY'S TRUCKING, AND BILLY D. KIRK,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kowalski* v. *Tesmer* (No. 03-407, certiorari granted, January 20, 2004), this Court will be considering whether the Fourteenth Amendment requires the States to allow an appeal as of right in criminal cases as part of the process due to an accused before the State may deprive him of his liberty. This case presents a companion issue. Unlike forty-eight other States, only West Virginia (from which this case arises) and New Hampshire deny any appeal as of right to defendants in civil cases, even when, as in this case, they face a verdict ordering them to pay millions of dollars in damages. The question presented is:

Whether the Due Process Clause of the Fourteenth Amendment requires States to afford civil litigants at least one appeal as of right to review judgments that award substantial compensatory and/or punitive damages.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND RULE 29.6 STATEMENT

Mountain Enterprises, Inc., was the petitioner in the Supreme Court of Appeals of West Virginia and is petitioner in this Court. Mountain Enterprises, Inc., does business as Lenore Asphalt, Inc., and states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

The respondents in the Supreme Court of Appeals (also respondents in this Court) were Daniel R. Fitch and Adam Plumley, as co-administrators of the Estates of Harley Fitch and Tyler Fitch, deceased, and Daniel R. Fitch, individually.

Two other parties, Jerry Galloway (individually and doing business as Galloway's Trucking) and Billy D. Kirk, were defendants in the West Virginia trial court. These parties did not file petitions for appeal in the Supreme Court of Appeals, but are listed in that court's caption, and thus are assumed to be respondents in that court, cf. S. Ct. R. 12.6, and respondents in this Court, *ibid.*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mountain Enterprises, Inc. ("Mountain"), respectfully petitions for a writ of certiorari to review the order of the Supreme Court of Appeals of West Virginia refusing to hear Mountain's appeal in this case.

Mountain is simultaneously filing a separate petition for a writ of certiorari seeking review of the underlying decision of the Circuit Court of Lincoln County, which is the highest court of the State that actually reviewed Mountain's federal constitutional claims. See Pet. in No. 03-__ ("Cir. Ct. Pet.").

OPINIONS BELOW

The Supreme Court of Appeals of West Virginia denied Mountain's petition for appeal in an unpublished order (App. 1a, *infra*). Mountain's motion for reconsideration of that order was similarly denied in an unpublished order (App. 3a, *infra*).

JURISDICTION

The Supreme Court of Appeals denied Mountain's petition for appeal by an order entered on October 29, 2003 (App. 1a, *infra*), which let stand a final judgment against Mountain that had been entered on February 1, 2002, by the Circuit Court of Lincoln County, West Virginia. The Supreme Court of Appeals denied Mountain's motion for reconsideration by an order entered on January 16, 2004 (App. 5a, *infra*). This Court has jurisdiction to review the order denying the petition for appeal under 28 U.S.C. § 1257(a). On January 21, 2004, Chief Justice Rehnquist granted an extension of the time within which Mountain must file its petition for a writ of certiorari to and including February 26, 2004.

Because the constitutionality of the State of West Virginia's failure to afford civil litigants at least one appeal

as of right is drawn into question by this Petition, 28 U.S.C. § 2403(b) may apply. Pursuant to this Court's Rule 29.4(b), Mountain has served this Petition on the Attorney General of West Virginia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property without due process of law * * *."

Rule 7 of the West Virginia Rules of Appellate Procedure ("Rejection Or Allowance Of Appeal") provides:

> (a) Rejection. If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.
>
> * * *
>
> (c) Allowance. If the petition for appeal is granted:
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> (1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petitioner, and to the clerk of the circuit court, who shall retain the same in his records.
>
> (2) The Clerk of the Supreme Court shall forthwith return the record, unless the entire record had been transmitted, to the clerk of the circuit court for

preparation of the record of the case for appeal in accordance with Rules 8 and 9.

(3) The Clerk of the Supreme Court shall then send a copy of the order to all parties appearing of record, other than the petitioner, that they may be heard, and shall also issue any supersedeas which may have been awarded. The Clerk of the Supreme Court shall serve the order upon the parties by mailing the same to the counsel of record for each party, or if there is no counsel of record, to the party at his last known address. Service shall be complete upon mailing. The Clerk of the Supreme Court shall note upon the docket the names of the parties to whom the orders were mailed, with the date of mailing.

(4) The Court may grant a supersedeas or modify the conditions thereof, in accordance with Rule 6.

STATEMENT

This case presents an issue closely related to one this Court has agreed to review in *Kowalski* v. *Tesmer*, No. 03-407, cert. granted, January 20, 2004, concerning the obligations of the States under the Fourteenth Amendment to make available at least one appeal as of right from a final judgment that would deprive a person of liberty or property. In *Kowalski*, the claimed right to appeal involves a deprivation of liberty after a criminal conviction. In this case, Mountain claims a right to have at least one level of appellate review on the merits of a judgment in a civil case assessing millions of dollars in compensatory and punitive damages.

1. The State of West Virginia has no intermediate appellate court and does not afford a civil litigant an appeal as of right to the State's Supreme Court of Appeals. Instead, the State requires that the losing party file a *petition* for

appeal. See W. Va. R. App. P. 3, 5, 7; W. Va. Const. art. VIII, § 4. The State Supreme Court has absolute discretion whether to grant or deny the petition, and it makes this decision without the benefit of the full record. See W. Va. R. App. P. 7, 9; *Billotti* v. *Dodrill*, 394 S.E.2d 32, 37 (W. Va. 1990) (characterizing review of petitions for appeal as having "significant discretionary elements"). In these respects, a petition for appeal resembles a petition for a writ of certiorari in this Court, which normally follows appellate review as of right in a federal court of appeals or a state appellate court. Unlike this Court's discretionary practice, however, a grant of leave to appeal to the West Virginia Supreme Court requires the affirmative vote of a majority of the full five-judge court (unless only four judges are sitting, in which case two votes suffice). See R. STERN, APPELLATE PRACTICE IN THE UNITED STATES, at 14 (2d ed. 1989).

Further, while the petitioner may request an opportunity to present the petition orally, it is in the court's discretion whether to grant or deny the request. See W. Va. R. App. P. 5(a). This opportunity is almost never granted and was not in this instance. Only if a majority of the judges vote to permit an appeal is the case docketed in the State Supreme Court, W. Va. R. App. P. 7(b), the full record assembled, W. Va. R. App. P. 8-9, the appeal fully briefed on the merits, W. Va. R. App. P. 10, and oral argument held, W.Va. R. App. P. 11-12.

In this case, despite Mountain's presentation of several substantial claims of error in its petition for appeal (which we detail presently and which include two claims under the Due Process Clause of the Fourteenth Amendment), the Supreme Court of Appeals denied the petition in a one-sentence order that offered no explanation for the refusal to entertain the appeal. App. 2a, *infra*.

2. This case arose from an April 1999 collision between an asphalt-carrying truck owned by Jerry Galloway and driven by Billy Kirk and an oncoming Lincoln Town Car.

The collision killed the Town Car's driver, Leigh Poindexter, and her two children, Tyler and Harley Fitch. *E.g.*, 5/31/01 Tr. at 90, 97, 98, 102, 107. Petitioner Mountain had hired the trucking company to transport asphalt from Mountain's asphalt plant to a portion of highway in Lincoln County, West Virginia, that Mountain was paving pursuant to a contract with the State. *E.g.*, 6/19/01 Tr. at 102, 105.

The representatives of the minor victims brought suit against Kirk, Galloway, and Mountain in the Circuit Court of Lincoln County.[1] At the jury trial, which lasted several weeks, the cause of the accident was basically undisputed. The truck's left front tire was badly worn and blew out (*e.g.*, 6/6/01 Tr. at 49), causing the truck to swerve over the center-line of the road (*e.g.*, *id.* at 81-82) and collide with, tip over, and land on top of the Town Car (*e.g.*, *id.* at 84). Similarly undisputed was the liability of Galloway (the truck's owner) and Kirk (the driver).

Mountain, on the other hand, steadfastly disputed that it was responsible for the condition of the Galloway truck and consequently denied that it should bear any liability for the victims' deaths.

a. Mountain moved for summary judgment, arguing that it had not itself engaged in any culpable conduct, and could not be held vicariously liable for Galloway's or Kirk's acts because Galloway was an independent contractor. The trial court denied the motion, holding that Mountain was precluded from asserting the independent-contractor defense by three supposed exceptions to the defense: (1) Mountain was performing "inherently dangerous" work; (2) Mountain was performing work requiring a franchise from a public

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[1] The Estate of the deceased driver of the Town Car, Leigh Poindexter, brought a separate action against the same three defendants, which was settled. Under the settlement, Mountain paid $1,700,000 to Poindexter's Estate.

authority and involving an unreasonable risk of harm to others; and (3) Mountain's contract with the State imposed upon Mountain a non-delegable duty to protect the safety of the public on the highways over which materials were transported to and from the job site. Cir. Ct. Pet. App. 1a, 12a-13a.

Mountain argued that none of these exceptions was applicable. For example, on the first, which is not addressed by any West Virginia cases, Mountain pointed to Section 416 of the RESTATEMENT (SECOND) OF TORTS and to New Jersey and California decisions holding that hauling of asphalt is not an inherently dangerous activity where, as here, there is no direct relationship between the nature of asphalt and the cause of the accident or injuries. See *Teichert & Son, Inc.* v. *Superior Court*, 225 Cal. Rptr. 10 (Cal. Ct. App. 1986); *Mavrikidis* v. *Petullo*, 707 A.2d 977 (N.J. 1988). Mountain argued that the fact that the truck was carrying asphalt as distinct from some other commodity was purely incidental and not causative of the accident. Mountain presented similarly well-supported arguments against applicability of the second and third exceptions to the independent-contractor defense.

Nonetheless, the trial court rejected Mountain's arguments and instructed the jury that Mountain ***must*** be held vicariously liable for any culpable acts committed by Galloway or Kirk. Cir. Ct. Pet. App. 25a.

b. In ruling that the independent contractor defense was unavailable because Mountain was subject to a non-delegable duty, the court held that the contract between Mountain and the State imposed upon Mountain a duty to protect public safety not only at the job site, but also between Mountain's asphalt plant and the job-site. Cir. Ct. Pet. App. 13a. During the trial, the court excluded testimony by the State official who had signed the contract on the State's behalf. Cir. Ct. Pet. App. 23a. This official had testified in his deposition

that the contract did not impose any such duty upon Mountain and did not impose absolute liability for any accidents that might occur in delivering materials to the job site. 6/6/01 Tr. at 132-34.

c. In addition to its defense to liability for compensatory damages, Mountain argued that it could not be held liable for punitive damages because there was insufficient evidence that it had engaged directly in any misconduct or had authorized or ratified the primary wrongdoers' misconduct. As to authorization/ratification, Mountain pointed out that, prior to the accident, it had no knowledge that Galloway or Kirk had been involved in any accidents or had been cited for violations of any motor vehicle laws and similarly was unaware of any problems with Galloway's trucks apart from minor mechanical ones. *E.g.*, 6/4/01 Tr. at 181; 6/14/01 Tr. at 39, 40, 97-98, 106-07, 174.

As to direct liability, Mountain emphasized that, prior to the trial court's ruling about Mountain's supposed duty to protect the public safety away from the project site, the settled industry view, endorsed by the relevant State contracting officer, was that a paving contractor's legal responsibility to protect the safety of the public concerned only the project site, not the public roads leading to that site. 6/6/01 Tr. at 132-34. Mountain accordingly argued that while due process might countenance the imposition of compensatory damages in such circumstances, it would not allow punitive damages for violation of a newly-announced duty. The trial court nonetheless allowed the jury to impose punitive as well as compensatory damages against Mountain. Cir. Ct. Pet. App. 25a-26a.

The jury was presented with a verdict form that posited two bases for assessing punitive damages against Mountain and called for the jury to determine whether one or both were satisfied. The first addressed ratification, the second direct liability. The jury responded affirmatively on both bases,

and noted an amount of $6,000,000 next to each, but never totaled these amounts.

d. Mountain invoked the form's ambiguity and West Virginia's rule of lenity, urging the trial court to construe this ambiguous verdict as calling for a punitive amount of $6,000,000, because the jury may well have intended only this amount to be imposed for Mountain's role in the accident, as opposed to intending to have the two sums added together. There was, after all, only a single injury-causing occurrence and no indication that separate harms had flowed from the conduct underlying the different predicates for punitive liability. Nevertheless, the court instead interpreted the verdict to be for $12,000,000 in punitive damages. Cir. Ct. Pet. App. 34a.

e. Mountain contended that either a $6,000,000 or a $12,000,000 punitive award would be excessive under state and federal law because, *inter alia*, Mountain lacked notice that it was subject to a duty to protect public safety beyond the job site, Mountain's conduct was not willful but at most negligent, and the $6,000,000 in compensatory damages award (together with the $1,700,000 Mountain had paid in settlement of the action brought by the Estate of Leigh Poindexter) was more than adequate to satisfy the deterrent purposes of the punitive sanction. The trial court rejected all of Mountain's arguments and upheld the $12,000,000 punitive award. Cir. Ct. Pet. App. 74a-77a. Added to the roughly $6,000,000 in compensatory damages, this made for a total verdict against Mountain of approximately $18,000,000.

3. After the trial court denied Mountain's post-verdict motions for judgment as a matter of law and/or a new trial, Mountain filed a petition for appeal to the Supreme Court of Appeals, presenting the following issues:

- Whether Mountain was erroneously denied the independent-contractor defense to vicarious liability for compensatory damages.
- Whether the Due Process Clause of the Fourteenth Amendment prohibits imposition of punitive (as opposed to compensatory) damages for violation of a newly-announced duty of care.
- Whether the testimony of the State official regarding the meaning of the public-safety provision in the State-Mountain contract should have been admitted because the contract was ambiguous.
- Whether the ambiguous jury verdict form should have been construed as imposing a $6,000,000 punitive damages award, rather than a $12,000,000 award.
- Whether the punitive damages were in any event grossly excessive under state law and the Due Process Clause of the Fourteenth Amendment.

Mountain further requested an opportunity, pursuant to W. Va. R. App. P. 5, to present oral argument in support of its petition. The court did not grant this request.

On October 29, 2003, the court denied Mountain's petition, stating only that "[u]pon consideration whereof, the Court is of the opinion to and doth hereby refuse said petition for appeal." App. 2a, *infra*.

On November 6, 2003, Mountain filed a motion for reconsideration of that order, arguing that the Due Process Clause of the Fourteenth Amendment requires that States afford civil litigants at least one appeal as of right, especially those litigants who (like Mountain here) have suffered a substantial compensatory and/or punitive damages judgment

in the trial court. The court, again without explanation, denied this motion by order entered January 16, 2004. App. 3a, *infra*.

REASONS FOR GRANTING THE PETITION

Of the fifty States, only West Virginia and New Hampshire fail to afford civil litigants an appeal as of right.[2] This anomalous regime cannot survive contemporary standards for due process of law in civil litigation. In failing to provide even one appellate forum as of right, West Virginia's system furnishes an inadequate process for correcting the errors that one-judge trial courts inevitably make. Moreover, these concerns are enhanced where, as here, that judge is elected and is awarding substantial damages to a local plaintiff at the expense of an out-of-state corporate defendant. The Due Process Clause requires more, especially in cases where the would-be appellant will suffer a substantial deprivation of property resulting from the unreviewed judgment of a single fallible judge.

This is such a case. Mountain faces a judgment of $12,000,000 in punitive damages and roughly $6,000,000 in compensatory damages, yet its several substantial claims of trial-court error were brushed aside without any meaningful consideration of their merits. This Court should grant review and make clear that the Due Process Clause requires that civil litigants in ***every*** State, not just in 48, be afforded at least one appeal as of right in cases where verdicts purport to deprive them of substantial property by awarding large amounts of compensatory and/or punitive damages. Alternatively, the Court should hold the petition pending its decision in *Kowalski* v. *Tesmer*, No. 03-407, cert. granted, Jan. 20, 2004, which presents a similar issue in the criminal context.

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[2] See STERN, *supra*, at 13, 15; W. Va. R. App. P. 7; N.H. S. Ct. R. 7.

I. DUE PROCESS REQUIRES THAT STATES AFFORD CIVIL LITIGANTS AN APPEAL AS OF RIGHT WHERE SUBSTANTIAL PROPERTY INTERESTS ARE AT STAKE.

This Court has referred in several criminal cases to a "traditional principle that a State is not obliged to provide any appeal at all for criminal defendants." *Ross* v. *Moffitt*, 417 U.S. 600, 606 (1974). See also, *e.g.*, *Smith* v. *Robbins*, 528 U.S. 259, 269 n.5 (2000); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Griffin* v. *Illinois*, 351 U.S. 12, 20-21 (1955) (Frankfurter, J., concurring); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894).

Nevertheless, no decision by this Court has ever relied on this supposed "principle" to deny any litigant in either a civil or criminal case the right to at least one appeal as of right. Reference to the supposed "principle" was not necessary to the holdings of these cases, because in each case the State *did* provide an appeal as of right. The questions this Court had to decide concerned either the constitutionality of *conditions* placed upon the appeal or the availability of counsel in a *further, post-appeal, discretionary-review* proceeding. See *Smith*, 528 U.S. at 276 (upholding California's procedure for appellate counsel to withdraw from representation upon determining the appeal is meritless); *Jones*, 463 U.S. at 754 (appellate counsel need not raise every non-frivolous issue that his client requests); *Ross*, 417 U.S. at 610 (States need not provide defendant with counsel in a second, discretionary appeal); *Griffin*, 351 U.S. at 22 (Frankfurter, J., concurring) (State may not condition first appeal upon defendant's ability to pay for a trial transcript); *McKane*, 153 U.S. at 686 (State may decide to deny bail pending first appeal).[3]

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[3] See also, *e.g.*, *Estelle* v. *Dorrough*, 420 U.S. 534 (1975) *(per curiam)* (holding that the constitution is not violated by a State's

In any event, it is highly doubtful that the Court today would take this supposed "principle" literally. As Justice Brennan pointed out in dissent in *Jones*, 463 U.S. at 756 n.1 (citations omitted):

> If the question were to come before us in a proper case, I have little doubt that the passage of nearly 30 years since *Griffin* and some 90 years since *McKane* * * * would lead us to * * * decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.

By granting certiorari in *Kowalski* v. *Tesmer* this past January, the Court evidently has decided to reexamine this "principle." This review is particularly appropriate in light of empirical evidence and anecdotal experience showing that, in both criminal and civil cases, there is a relatively high rate of serious error at the trial level. Left without an appellate remedy, tens of thousands of criminal defendants would suffer deprivations of liberty and/or property based on judgments that an appellate court would find fatally flawed. Moreover, the current, virtually uniform practice of the States (and the federal system) providing an appeal as of

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dismissal of a pending appeal upon the defendant's escape from prison).

right in criminal cases powerfully suggests that modern notions of due process do not allow any State to deny criminal defendants at least one opportunity for appellate review of their convictions.

For similar reasons, it is timely to determine whether contemporary notions of due process in the civil justice system also require an appeal as of right in cases involving substantial damage awards. Just as with the development of procedural due process in the criminal context, this Court has consistently strengthened the constitutional standards for the "process" the States must make available before depriving persons of their property in civil litigation. The due process framework established in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), involves balancing three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985) (applying these factors and holding that due process required a hearing before school security guard could be terminated "for cause").

Under this kind of analysis, it is now time to hold that due process requires at least one appeal as of right in civil cases involving substantial deprivation of a defendant's property.

A. An Important Property Interest Is Implicated By The West Virginia Courts' Imposition Of A Large Money Judgment Upon A Defendant.

There can be no doubt that a damages judgment, compensatory or punitive, constitutes a deprivation of property within the meaning of the Due Process Clause. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 571-72 (1972)

(stating that the concept of "property" includes "real estate, chattels, or money" but is not limited just to these forms of property). Indeed, this proposition is so self-evident that this Court routinely analyzes due process challenges to civil litigation procedures without even pausing over the threshold question whether a "property" interest protected by the Due Process Clause exists. This obvious predicate for due-process protection is especially applicable when a jury has been allowed to award punitive damages. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 123 S.Ct. 1513, 1520-21 (2003) ("Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice.") (internal quotation marks omitted).

In this case, of course, Mountain has been subjected to substantial awards of both compensatory (approximately $6,000,000) and punitive ($12,000,000) damages. There can be no question that a trial court's order to transfer these huge sums threatens to deprive Mountain of its constitutionally protected "property." The question is what process is "due" before such an order may take effect.

B. West Virginia's Failure To Afford Civil Litigants An Appeal As Of Right Creates An Intolerably High Risk Of Erroneous Deprivation Of A Defendant's Property.

West Virginia's failure to afford an appeal as of right "runs counter to the 'imperative,' underlying the appellate structures of this country and many others, that a litigant should have a remedy against the possibly arbitrary or erroneous rulings of a one-judge court." R. STERN, APPELLATE PRACTICE IN THE UNITED STATES, at 15 (2d ed. 1989) (quoting P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 132-33 (1976)).

It is self-evident that trial judges commit errors in a significant number of cases. Any state process that leaves

correction of such errors, when substantial property interests are at stake, to a purely discretionary system of appellate review does not reasonably protect those substantial property interests.

West Virginia's appellate reversal rate (when measured against a denominator of *all* civil petitions considered) is lower than the appellate reversal rates in States that do afford an appeal as of right. In the four-year period 1999-2002, the Supreme Court of Appeals of West Virginia granted review of approximately one-third of the civil cases in which parties sought to appeal. See ADMINISTRATIVE OFFICE OF THE SUPREME COURT OF APPEALS, WEST VIRGINIA COURT SYSTEM 2002 ANNUAL REPORT ("2002 ANNUAL REPORT"), at 8 (May 2003) (1999–30%; 2000–29%; 2001–39%; 2002–35%). It defies common experience to believe that the process of discretionary review, culminating in nothing more than a few routine words in an entirely conclusory order, is adequate to identify reliably whether reversible errors have occurred. Inevitably, some significant number of the hundreds of cases left unreviewed on the merits were deprived of the error-correcting function that is the essence of appellate review in modern systems of civil justice.

West Virginia does not publish statistics showing how often its State Supreme Court reverses judgments in the minority of cases in which that court entertains an appeal. Nevertheless, even if one assumes that it reverses in 60% of the cases in which it allows an appeal, the effective reversal rate for *all* cases in which the losing party tried to get appellate review reveals the magnitude of the problem.[4] This

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[4] The leading study of comparative state high court dispositions calculated that, in the period from 1870 to 1970, the West Virginia Supreme Court of Appeals reversed the judgments in about 58% of cases in which it allowed appeals. See Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 Yale L.J. 1191, 1215 (1978).

generous assumption of a 60% reversal rate in granted cases would mean that there are reversals in about 20% of all the cases in which civil litigants who seek to appeal from judgments of the West Virginia trial courts.

By contrast, one study has calculated that other, comparable state supreme courts (*i.e.*, those in which there was no intermediate appellate court), where appeals *of right* were allowed reversed the underlying judgments in a far higher proportion of cases. This study, cited in the margin, covered four such States: Maine, Nevada, Rhode Island, and South Dakota. See STERN, at 7 n.14 (listing States that, as of 1988, had no intermediate appellate courts). The study estimated a 35.5% reversal rate for Maine, 32.3% for Nevada, 34.1% for Rhode Island, and 41.5% for South Dakota. See Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, *supra* n. 4, at 1215. Thus, the *effective* reversal rates for all attempted appeals in West Virginia fall well below the reversal rates in these comparable States. If one makes the reasonable assumption that trial courts in all of these States err with approximately similar frequency, these numbers confirm what is intuitively obvious: By refusing to recognize a right to even one appeal on the merits, West Virginia falls far short of the other States in assuring that the judgments of its elected trial judges are reliable enough to support substantial property deprivations.

Anecdotal experience also casts doubt on the ability of the West Virginia Supreme Court of Appeals' ability to identify substantial errors presented by petitions for appeal. For example, in the context of a 1997 murder prosecution in West Virginia trial court, the defendant moved to suppress evidence on the ground that it was taken from a dwelling the officers had entered without a warrant, in violation of the Fourth Amendment. The trial court denied the motion, "approv[ing] the search as one of a 'homicide crime scene.'" *Flippo* v. *West Virginia*, 528 U.S. 11, 13 (1999) *(per curiam)* (quoting trial-court decision). The defendant filed a petition

for appeal, but the West Virginia Supreme Court of Appeals denied discretionary review. *Ibid.* This Court then reversed the West Virginia trial court's decision summarily, finding that it "squarely conflicts with *Mincey* v. *Arizona*[, 437 U.S. 385 (1978)], where we rejected the contention that there is a 'murder scene exception' to the Warrant Clause of the Fourth Amendment." *Id.* at 12-13. See also *National Mines Corp.* v. *Caryl*, 497 U.S. 922 (1990) (summarily reversing West Virginia trial court in case where West Virginia Supreme Court of Appeals had denied discretionary review); *Ashland Oil, Inc.* v. *Caryl*, 497 U.S. 916 (1990) (same).

Although this Court was able to correct the West Virginia trial court's error in *Flippo*, that surely does not furnish an acceptable solution. Given the substantial demands upon this Court, it cannot be expected to catch all the clear errors that the West Virginia Supreme Court of Appeals overlooks in its discretionary-review process. Moreover, this Court lacks jurisdiction to correct a trial court's errors of *state* law, several of which have been alleged by Mountain in this case. See *supra*, at 8-9. West Virginia defendants, both civil and criminal, must be afforded an appeal as of right so that such errors may be rectified. At bottom, while discretionary review functions perfectly well when employed by a court (such as this Court) that does not sit to correct errors, it is plainly inadequate when employed by a court (such as the West Virginia Supreme Court of Appeals) that stands as a civil litigant's sole recourse for correction of the errors that one-judge trial courts inevitably make with sufficient frequency to be a source of concern.

All but one of the other States recognize that the unacceptably high risk of erroneous deprivation of liberty or property *requires* process in which a losing litigant has a *right* to one level of appellate review of the trial court's judgment. That nearly universal acknowledgment speaks volumes about the kind of process that is "due" in contemporary civil justice systems.

C. West Virginia's Interest In Avoiding The Costs Entailed By An Appeal As Of Right Does Not Outweigh Defendants' Interest In Protection Against Erroneous Deprivation Of Property.

The *Mathews* v. *Eldridge* analysis also requires consideration of the State's interest in refusing to supply a more reliable and careful process. The only countervailing consideration here is cost, but that factor cannot offset the compelling reasons for establishing a system of justice that allows for at least one appeal as of right.

The most obvious indicator of the economic feasibility of affording civil litigants an appeal as of right is the fact that forty-eight States provide one, and only two (West Virginia and New Hampshire) do not.[5] See *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 426 (1994) (holding that Due Process Clause requires postverdict judicial review of the amount of a punitive damages award because, *inter alia*, such review is afforded by "the federal courts and in every State, except Oregon"); *Ake* v. *Oklahoma*, 470 U.S. 68, 78 (1985) (in recognizing a constitutional right of an indigent criminal defendant to state-funded psychiatric assistance, stating: "Many states, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance."); *Tesmer* v. *Granholm*, 333 F.3d 683, 700-01 (6th Cir. 2003), cert. granted sub nom. *Kowalski* v. *Tesmer*, No. 03-407 (invalidating Michigan's system for appointment of appellate counsel in criminal cases because,

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[5] European countries too reflect this consensus that a civil litigant should be afforded at least one appeal as of right. See MARY ANN GLENDON, MICHAEL WALLACE GORDON & PAOLO G. CAROZZA, COMPARATIVE LEGAL TRADITIONS, at 101 (2d ed. 1999) ("Decisions of the ordinary civil and criminal courts of first instance may as a rule be appealed to an intermediate appellate court.").

inter alia, it diverges from the practice followed in all the other States).

More generally, such an overwhelming consensus among the States is strong support for recognizing a federal Due Process right. Indeed, the Court has been prepared to find that the policy of a minority of States can no longer survive national concepts of constitutional Due Process, even when there were far more States in the minority than in this matter, where 48 States (as well as the federal government and all United States territories and possessions) recognize the right to at least one appeal in civil cases, while only two deny it. See *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2481 (2003) (recognizing a due process right to engage in private homosexual conduct, relying, *inter alia*, on the growing consensus among the States that anti-sodomy laws should be repealed or at least not enforced); *Burnham* v. *Superior Court*, 495 U.S. 604, 621-22 (1990) (citing *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977)) (suggesting that due process can be "offended by the perpetuation of ancient forms that are no longer justified * * * when the 'perpetuation of ancient forms' is engaged in by only a very small minority of the States"); *Roper* v. *Simmons*, No. 03-633, cert. granted, Jan. 26, 2004 (presenting question, *inter alia*, whether the States' evolving consensus against imposition of capital punishment upon minors warrants a holding that Eighth and Fourteenth Amendments preclude imposing capital punishment upon minors).

At the very least, due process should require that States afford an appeal as of right to review those errors that would, if corrected, result in vacatur or remittitur of a punitive award. Such errors would include not only a claim of excessiveness of the punitive award, but also, for example, a claim that punitive *liability* was not established. On numerous occasions this Court has emphasized the importance of appellate review in evaluating the constitutionality of punitive awards, which impose

punishment (financially and reputationally) and therefore trigger special fairness concerns. See, *e.g.*, *State Farm*, 123 S.Ct. at 1520-21 ("Exacting *appellate* review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice.") (internal quotation marks omitted; emphasis added).

In short, the extra burden of affording an appeal as of right, which is nearly universally viewed as a needed and important component of a fair and adequate system of justice and which virtually all other States voluntarily assume, cannot outweigh the intolerable risk, entailed by West Virginia's system, of erroneous deprivations of substantial property interests.

II. THE QUESTION PRESENTED IS SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S CONSIDERATION.

The issue posed by this case affects hundreds or thousands of litigants in the courts of West Virginia and New Hampshire who are denied the right to appeal from judgments ordering them to transfer substantial property to other persons. The importance of the issue is amply illustrated by the facts of this case. Mountain faces an $18,000,000 judgment (including a $12,000,000 punitive award), imposed by a single, locally elected trial judge, and was denied an adequate appellate forum for any of its numerous, substantial claims of error. The absence of an appeal as of right has surely resulted in substantial denials of property and liberty interests in other West Virginia cases as well. See, *e.g.*, *Flippo*, *supra*. Only this Court can require West Virginia to redress the systemic inadequacy of its court system.

The significance of the issue is further demonstrated by this Court's recent grant of certiorari in *Kowalski* v. *Tesmer*, No. 03-407, cert. granted, January 20, 2004. *Kowalski*

presents the question whether the federal Constitution requires the State of Michigan, which provides only a discretionary first appeal to criminal defendants who have pled guilty, to provide indigent defendants with appointed counsel to assist in preparing the petition for such discretionary first appeal. 03-407 Pet., at i. Although there may be equal protection overtones to the issue in *Kowalski* that are not present here, this Court's decision may well turn on the importance of a first appeal in correcting trial-court errors. As the Sixth Circuit observed in its ruling in *Kowalski*, this Court's holding in *Ross*, *supra*, that indigent criminal defendants have no right to appointed counsel in a second-level discretionary appeal, rested on a distinction between first-level appeals and second-level appeals — the former exists primarily to correct errors, the latter to address issues of significant public interest or jurisprudential significance. See *Tesmer* v. *Granholm*, 333 F.3d at 697-98; 03-407 Pet., at 4.

The instant case provides an excellent opportunity for this Court to address the importance of a first appeal in the civil context. This case should be set for review in tandem with *Kowalski*. At the very least, the Court should hold the instant Petition pending its decision in *Kowalski*.

CONCLUSION

The petition for a writ of certiorari should be granted and, if feasible, the case should be set for oral argument in tandem with *Kowalski*. Alternatively, the petition should be held pending this Court's decision in *Kowalski*.

Respectfully submitted.

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FEBRUARY 2004

APPENDIX

APPENDIX A

[DECISION DENYING PETITION FOR APPEAL]
[UNPUBLISHED]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th of October, 2003, the following order was made and entered:

Daniel R. Fitch, and Adam Plumley,
co-Administrators of the Estates of Harley
Fitch and Tyler Fitch, deceased, and
Daniel R. Fitch, individually, Plaintiffs
Below, Respondents

vs.) No. 031470

Mountain Enterprises, Inc., d/b/a Lenore
Asphalt, Inc., a Kentucky corporation,
Jerry Galloway, individually, and d/b/a
Galloway's Trucking, and Billy D. Kirk,
Defendants Below,

Mountain Enterprises, Inc. Petitioner

On a former day, to-wit, July 14, 2003, came the petitioner, Mountain Enterprises, Inc., by A.L. Emch and Gretchen M. Callas, Jackson Kelly, its attorney, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Lincoln County, rendered on the 21st day of October, 2003, with the record accompanying the petition. Thereafter, on the 24th day of July, 2003, came the respondents, Daniel R. Fitch and Gregory Adam Plumley, by H. Truman Chafin and Letitia Neese Chafin, The H. Truman Chafin Law Firm, their

attorney, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/_____
Clerk, Supreme Court of Appeals

APPENDIX B

[WEST VIRGINIA SUPREME COURT OF APPEALS' ORDER DENYING RECONSIDERATION]

[UNPUBLISHED]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of January, 2004, the following order was made and entered:

Daniel R. Fitch and Adam Plumley,
co-administrators of the Estates of Harley
Fitch and Tyler Fitch, deceased, and
Daniel Fitch, individually, Plaintiffs
Below, Respondents

vs.) No. 031470

Mountain Enterprises, Inc., dlb/a Lenore
Asphalt, Inc., a Kentucky corporation,
Jerry Galloway, individually and d/b/a
Galloway's Trucking, and Billy D. Kirk,
Defendants Below,

Mountain Enterprises, Inc., Petitioner

On a former day, to-wit, November 26, 2003, came the petitioner, Mountain Enterprises, Inc., by A. L. Emch, Jackson Kelly PLLC, its attorney, and presented to the Court its motion in writing for reconsideration of its petition for appeal refused by order of this Court entered on the 29th day of October, 2003.

Thereafter, on the 19th day of December, 2003, came the respondents, Daniel R. Fitch, et al., by H. Truman Chafin and

Letitia A. Chafin, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion for reconsideration.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

APPENDIX C

[TRIAL COURT TRIAL ORDER AND FINAL JUDGMENT ORDER]

[UNPUBLISHED]

IN THE CIRCUIT COURT
OF LINCOLN COUNTY,
WEST VIRGINIA:

DANIEL R. FITCH, and ADAM PLUMLEY,
Co-Administrators of the Estates of Harley Fitch
and Tyler Fitch, deceased and DANIEL R. FITCH,
individually,

Plaintiffs,

v. CIVIL ACTION NO. 99-C-86

MOUNTAIN ENTERPRISES, INC., d/b/a
Lenore Asphalt, Inc., a Kentucky corporation,
JERRY GALLOWAY, individually and d/b/a
Galloway's Trucking, and BILLY D. KIRK,

Defendants.

TRIAL ORDER AND FINAL JUDGMENT ORDER

On the 21st day of May, 2001 this matter came before the Court for the Court to rule on various pending motions previously argued, and now ripe for decision preparatory for the beginning of the trial of this case. Various motions were granted, and various motions were denied. Among the motions that were granted, was a motion to bifurcate the trial among the plaintiffs, such that William Poindexter as administer of the estate of Leigh Ann Poindexter would have his case heard separately from that of Daniel Fitch and Adam

Plumbley, co-administrators of the estates of Tyler and Harley Fitch.

On the 22nd day of May, various motions and preliminary matters were entertained by the Court, and the parties then proceeded with jury selection for the case of William Poindexter. The Court granted requests for individual voir dire in respect to several jurors. On May 23rd, the Court was prepared to proceed with opening statements, at which time the Court was informed that the parties had again entered into settlement negotiations and that it was believed that a settlement was imminent. The parties then announced to the Court that they had, in fact, reached a settlement of the case.

Whereupon, there was lengthy discussion as to how to proceed with the case of Daniel Fitch and Adam Plumbley. While neither Truman Chafin nor Letitia Neese, counsel for Daniel Fitch and Adam Plumbley, took part in the selection of the jury, Ms. Neese was present during jury selection. After full discussion of the matter among the parties, including Truman Chafin and Letitia Neese, all parties agreed to go ahead with the trial of the case of Daniel Fitch and Adam Plumbley, with the jury that had already been selected.

On the 29th day of May, the Court reconvened to hear a motion for mistrial from Mountain Enterprises, Inc., based upon an improper comment Judge Hoke was alleged to have made in the presence of the jury. Mountain Enterprises, Inc., called Peter Broadbent, III to the stand in support of its motion. After the testimony of Mr. Broadbent the Court enquired of each juror individually as to the comment. No juror recalled any comment of the nature alleged. Mountain Enterprises, Inc., withdrew it motion, at which time, Plaintiffs made a motion for a mistrial and a new jury. The Court refused to call a mistrial as a result of any prejudice plaintiffs may have suffered, and ordered parties to be prepared to proceed with the trial on May 31st.

On may 30th, the Court heard and ruled upon various motions not previously ruled upon as part of the Poindexter side of this case. On May 31st, the parties made opening statements and Plaintiffs first witness, Trooper Danny Chapman was called to the stand. At the conclusion of Trooper Chapman's testimony, Plaintiffs called Mona Dale Koontz. Following the direct examination of Ms. Koontz, the Court adjourned for the day.

On June 4th, the testimony of Ms. Koontz was concluded, and David R. Pesuit was called to the stand. Following Mr. Pesuit, Plaintiffs called Gary Huey. On June 5th, Plaintiffs called Charles Daniel Herman as an adverse witness. Following Mr. Herman's testimony, Plaintiff Daniel R. Fitch was called to the stand. On June 6th, the testimony of Daniel Fitch was concluded and plaintiffs called Dr. Charles Benedick. Following Dr. Benedick, Plaintiff Gregory Adam Plumbley was called to the stand. On June 7th, Plaintiffs called Dr. William Cobb followed by Dr. Daniel Selby. At the conclusion of Dr. Selby's testimony, the Plaintiffs rested.

At the close of the Plaintiffs' case in chief, various motions for a directed verdict were heard and denied by the Court. At the conclusion of the day on June 7th, the parties agreed to allow the Court to call a recess until June 14th, to allow one juror to attend work training in California.

On June 14th, Mountain Enterprises, Inc. began its case in chief calling Claudia Garnet Wheeler to the stand. Following Ms. Wheeler, Mountain Enterprises, Inc., called Rick S. Johnson and David A. Stopper. On June 15th, Mountain Enterprises, Inc. called Robert K. Tinney. Following the testimony of Mr. Tinney, Mountain called its Co-Defendant, Billy Kirk. At that point, due to various problems with the Courthouse electrical system, and in obtaining a court reporter, the trial was not continued until June 19th. On June 19th, Mountain Enterprises, Inc., called Leonard Lawson followed by Roger Griffith. At that point, Mountain

Enterprises, Inc., closed its case, while reserving the right to call an additional one or perhaps two witnesses.

On June 21st, Defendant Jerry Galloway, d.b.a. Galloway Trucking, opened his case in chief and called to the stand Defendant, Jerry Galloway. Following Mr. Galloway's testimony, Mr. Galloway called Charlie White as a witness. Following Mr. White's testimony, Mr. Galloway closed his case in chief. At that time, Defendant, Billy Kirk, informed the Court that he had no additional witnesses to call.

On June 22nd, Defendant, Billy Kirk, opened his case in chief by calling Erma Collier to the stand. After Ms. Collier's testimony, Billy Kirk closed his case in chief. Also on June 22nd, Mountain Enterprises called its additional witness, Camron Lewis. Following this testimony, Mountain Enterprises, Inc., closed it's case-in chief.

On June 25th, Plaintiff's called a rebuttal witness, Jason Price, whose testimony was heard in camera by the Court. The Court then allowed Mountain Enterprises, Inc., to reopen its case in chief, in order to call Dan Cooperridder. Following Mr. Cooperridder's testimony, and Mountain Enterprises, Inc., reclosing its case in chief, Plaintiffs' rebuttal witness, Jason Price testified to the jury.

At the close of evidence, various motions for a directed verdict were made, and the Court denied all of them. On June 27th, the Parties made their closing arguments, and the case was submitted to the jury for a verdict. They returned a verdict in favor of the plaintiffs, as follows:

1. On the issue of Compensatory Damages to the Estate of Harley Fitch:

A. Loss of income of the decedent: $1,300,000.00

B. Loss of services, protection, care and assistance provided by the decedent: $150,000.00

C. Compensation for sorrow, mental

anguish and solace: $1,500,000.00

D. Reasonable funeral expenses $9,214.16

TOTAL OF COMPENSATORY
DAMAGES FOR HARLEY FITCH $2,959,214.16

2. On the issue of Compensatory Damages to the Estate of Tyler Fitch:

A. Loss of income of the decedent: $1,300,000.00

B. Loss of services, protection, care and assistance provided by the decedent: $150,000.00

C. Compensation for sorrow, mental anguish and solace: $1,500,000.00

D. Reasonable funeral expenses $9,214.16

TOTAL OF COMPENSATORY
DAMAGES FOR TYLER FITCH $2,959,214.16

3. On the issue of Punitive Damages:

A. Against Billy D. Kirk: $10,000.00

B. Against Jerry Galloway individually and doing business as Galloway Trucking:

1. for explicitly or implicitly authorizing or ratifying the actions of Billy D. Kirk: $50,000.00

2. for his own individual acts or omissions: $50,000.00

C. Against Mountain Enterprises, Inc. doing business as Lenore Asphalt, Inc::

1. for explicitly or implicitly authorizing or ratifying the actions of Jerry Galloway and/or Billy D. Kirk: $6,000,000.00

2. for its own individual acts or omissions: $6,000,000.00

The jury awarded a Plaintiffs a total of eighteen million, twenty eight thousand, five hundred fifty eight dollars and fifty seven cents ($18,028,558.57).

On August 29th, this Court held a hearing to review the award of punitive damages, in accordance with Garnes v. Fleming Landfill, Inc., 186 W. Va. 6556, (1991). On December 21st, 2001, this Court entered an Order on the review of punitive damages, upholding the jury's verdict, and finding that it was proper. Accordingly, this Court hereby makes the following findings of fact and conclusions of law:

FINDINGS AND CONCLUSIONS

1. That all findings of fact and conclusions of law from this Court's Order regarding the review of punitive damages in this case, entered on December 21st, 2001 are hereby incorporated by reference;

2. That the jury's verdict as outlined above is just and proper and shall be entered as the final judgment in this case; and

3. That therefore, the Court enters judgment in favor of the Plaintiffs, in the amount of eighteen million, twenty eight thousand, five hundred fifty eight dollars and fifty seven cents ($18,028,558.57).

All of which is hereby ADJUDGED, ORDERED and DECREED.

The Clerk of this Court is hereby Ordered to provide a certified copy of this Order to all parties and counsel of record, by USPS First Class Mail, hand delivery or telefax communication.

Entered this /31st/ day of January, 2002 A.D.

[Stamped by Clerk as duly entered Feb. 1, 2002]

(2)

No. 03-1223

Supreme Court, U.S.
FILED
MAR 29 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

MOUNTAIN ENTERPRISES, INC.,

Petitioner,

v.

DANIEL R. FITCH AND GREGORY ADAM PLUMLEY, CO-ADMINISTRATORS OF THE ESTATES OF TYLER FITCH AND HARLEY FITCH, DECEASED, DANIEL R. FITCH, INDIVIDUALLY, JERRY GALLOWAY, INDIVIDUALLY AND D/B/A GALLOWAY'S TRUCKING, AND BILLY D. KIRK,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF *AMICUS CURIAE* OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Academy of Appellate Lawyers submits this brief as *amicus curiae* in support of Mountain Enterprises, Inc.'s petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia. The parties to the action have consented in writing to the filing of this brief pursuant to Rule 37.2(a) of the Rules of this Court. The letters of consent have been filed with the Clerk.[1]

INTEREST OF THE *AMICUS CURIAE*

The Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts, dedicated to the improvement and enhancement of the standards of appellate practice, the administration of justice, and the ethics of the profession as they relate to appellate practice. Membership in the Academy is by nomination or invitation only and the Academy currently has approximately 250 member "Fellows." The activities of the Academy are

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[1] Pursuant to Supreme Court Rule 37.6, the Academy states that this brief was written by an attorney who is a Fellow of the Academy, and was produced and funded exclusively by the Academy or its counsel. Although one of the counsel for the petitioner is a member of the Academy, he took no part in the decision whether to file this brief or in its preparation. Some of the Fellows of the Academy are active or former judicial officers. No active judicial officer has participated in the decision to file this brief or in its preparation. The brief has been reviewed by at least one Fellow who has served as a judicial officer of a state appellate court but who no longer serves in that capacity.

The Academy takes no position with respect to any issue or argument presented other than those expressed in the Academy's own brief.

supported entirely by the dues and initiation fees paid by the Fellows.

By publishing newsletters and reports, organizing retreats and conferences, teaching appellate courses and seminars, and establishing a network of lawyers, the Academy brings together the leading attorneys in the nation who devote their practices to appellate representation. The Academy has submitted its views to Congress on legislative changes affecting appellate practice. The Academy has chosen to file this *amicus* brief, because the case presents the opportunity for the Court to address the conflict between two apparently conflicting lines of cases.

The Supreme Court of Appeals of West Virginia is that state's only appellate court, and its jurisdiction is entirely discretionary. The court declined to hear petitioner's appeal of the jury's large punitive damage award, an issue to which this Court has extended constitutional limits and standards of review. The Academy believes the Court may wish to consider whether due process requires an appeal as of right in any case in which the Constitution requires a constraint on the fact-finder's potentially arbitrary power.

The Fellows of the Academy bring to this subject comprehensive knowledge of the roles of state and federal appellate courts and the impact of their decisions on the fabric of American life. The Fellows share a concern that courts not deprive litigants of liberty or property without a process that guarantees at least one level of review as of right.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THIS COURT REGARDING THE AVAILABILITY OF APPELLATE REVIEW IN CIVIL CASES PRESENT A CONFLICT REQUIRING THIS COURT'S ATTENTION.

For over a century, this Court has steadfastly maintained, often in dicta, that "[t]he Constitution does not . . . require States to create appellate review in the first

place." *Smith v. Robbins*, 528 U.S. 259, 270 n.5 (2000).[2] Yet in more recent history the Court has also identified constitutional issues where appellate review of certain trial determinations must be *de novo*. For example, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), this Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of

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[2] *See also, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) ("[T]he Federal Constitution guarantees no right to appellate review. . . ."); *Abney v. United States*, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal."); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review [citations omitted], and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (Black, J.) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all[,]" but if it does provide such review, it cannot discriminate against some because of their poverty.); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (respondent is not entitled to an appeal as of right); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) ("As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.") (citations omitted); *Reetz v. Michigan*, 188 U.S. 505, 508 (1903) (Neither is the right of appeal essential to due process of law); *McKane v. Durston*, 153 U.S. 684, 687-88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now, a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. . . . It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. . . . [W]hether an appeal should be allowed, and if so, under what circumstances, or on what conditions, are matters for each State to determine for itself.").

punitive damages awards." The Court has also recognized that in cases raising First Amendment issues appellate courts must "'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression," *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)), and that "the clearly erroneous standard of [Fed. R. Civ. P. 52(a)] does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times v. Sullivan*." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984).

There is tension between these lines of cases that is highlighted by the West Virginia Supreme Court of Appeals' decision to deny review in this case. This Court requires an appellate court to review a finding of punitive damages *de novo*. Where there is no appeal as of right, as there is not in West Virginia, and the appellate court exercises its discretion to decline review, as the West Virginia Supreme Court of Appeals did in this case, the appellant is denied the exacting *de novo* appellate review required by this Court. It means that litigants in cases where *de novo* review is a necessary component of the enforcement of certain constitutional limitations on the substantive powers of state courts are also deprived of that appellate review. This case offers the Court an opportunity to resolve that conflict.

II. APPELLATE REVIEW IS REQUIRED IF APPELLATE COURTS ARE TO CLARIFY AND TO MAINTAIN CONTROL OF CONSTITUTIONAL STANDARDS.

In a trio of seminal decisions, this Court has held that the Due Process Clause of the Fourteenth Amendment imposes substantive limits on the power of state courts to assess punitive damages against a civil defendant. *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996) (establishing

guideposts for testing punitive damage awards) ("*Gore*"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (requiring *de novo* review of punitive damage awards); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (establishing guidelines for compensatory versus punitive damage ratios).

In each case, the matter was remanded to the appellate court that had previously approved the award – *Gore* to the Alabama Supreme Court; *Cooper* to the Ninth Circuit; and *State Farm* to the Supreme Court of Utah – with the responsibility of examining the record in order to make an independent judgment as to whether the award was consistent with the constitutional guidelines. The Court reasoned that "[r]equiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Cooper*, 532 U.S. at 436 (quoting concurring opinion of Breyer, J., in *Gore*, 517 U.S. at 587).

Yet as the Court explained in *Cooper*, 532 U.S. at 443, it did not intend to "prejudge the answer to the constitutional question;" rather, that was the duty of the court of appeals under the *de novo* standard of review. Recognizing a right to appeal in West Virginia likewise will not determine the outcome of this appeal. It will, however, materially advance the interests not only of the immediate parties to this case, but of all whose liberty and property is subject to the power of that state's courts, in circumstances requiring judicial review for compliance with judicial safeguards.

Gore, *Cooper*, and *Campbell* have begun to spawn a rich jurisprudence of appellate decisions at both the state and federal level. For example, many state courts have ordered remittitur of punitive awards so that they remain

within the 4:1 ratio referred to in *State Farm* as "close to the line of constitutional impropriety."[3] On the other hand, the federal courts have been less inclined to treat the 4:1 ratio as a bright line of demarcation; they have been more willing to uphold awards with relatively high punitive/compensatory ratios in cases where the defendant's conduct has been "particularly egregious" but has resulted in only a small amount of economic damages.[4] The ultimate contours of the *Gore* and *State Farm* decisions will emerge over time as they are applied by the appellate courts. But there is no assurance that the constitutional constraints

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[3] *See, e.g., Waddill v. Anchor Hocking, Inc.*, 190 Or. App. 172, 78 P.2d 570 (Or. Ct. App. 2003) (instructing remittitur of $1 million punitive award to $400,000 in product liability action against fishbowl manufacturer, where jury awarded $100,000 in compensatory damages); *Harris v. Archer*, No. 07-01-0071-CV, 2004 WL 178398 (Tex. Ct. App. Jan. 29, 2004) (instructing remittitur of $1.5 million punitive award in action for fraud and breach of fiduciary duty, where compensatory damages were $200,000); *Honzawa v. Honzawa*, 766 N.Y.S.2d 29 (App. Div. 2003) (affirming trial court's remittitur of punitive damages to $15 million in malicious prosecution case, where compensatory damages were $11 million, but observing jury's original punitive award of $50 million was "excessive"), *appeal dismissed*, 1 N.Y.3d 564 (2003).

[4] *E.g., DiSorbo v. Hoy*, 343 F.3d 172, 187 (2d Cir. 2003) (finding that use of multiplier was simply "not the best tool" to assess punitive award in abuse of process claim against police officer involving nominal compensatory damages); *Lincoln v. Case*, 340 F.3d 283, 293-94 (5th Cir. 2003) (upholding $55,000 punitive damage award that exceeded compensatory damages by ratio of 110:1, reasoning that high ratio of punitive to compensatory damages is "far less troubling" in cases involving housing discrimination); *Asa-Brandt, Inc. v. ADM Investor Serv., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (upholding $1.25 million punitive damage award for breach of fiduciary duty where compensatory damages were nominal, reasoning that potential harm could have exceeded punitive damage award had defendant's scheme succeeded); *Mathias v. Accord Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) (upholding $186,000 punitive award 18 times compensatory damages awarded in case involving hotel managers who were grossly negligent in maintaining their hotel free of bedbugs).

these decisions require will be applied in situations where there is no guaranteed (*i.e.*, non-discretionary) appellate review.

For proof that appellate review is the *sine qua non* for ensuring that constitutional standards have been met, we need look no further than (i) this Court's decisions in punitive damage cases pre-dating *Gore*, and (ii) the field of libel law, where the constitutional safeguards accorded to the media have been preserved primarily through the process of appellate review.

A. The Punitive Damages Cases

One of the first cases in which this Court examined a punitive damages award in light of the Due Process Clause was *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). Although the Court upheld the award, it did so in large part because it was convinced that the Alabama Supreme Court's review constituted sufficient protection against the jury's exercise of unfettered discretion. As Justice Blackmun wrote:

> By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first undertakes a comparative analysis. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1053 (1987). It then applies the detailed substantive standards it has developed for evaluating punitive awards. In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (1989); *Wilson v. Dukona Corp.*, 547 So. 2d 70, 73 (1989). This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. *Id.* at 20-21.

After reviewing the standards adopted by the Alabama Supreme Court for punitive damage awards (standards similar to those subsequently adopted in *Gore*), the Court concluded that:

> The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. *Id.* at 22.

The importance of appellate review of punitive damage awards is exemplified by *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), where the Court struck down an amendment to the Oregon Constitution that prohibited judicial review of punitive damage awards, unless there was a finding that there was "no evidence" to support the jury's verdict. Writing for the Court, Justice Stevens pointed out that:

> Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded. *Id.* at 421.

Justice Stevens went on to note that Oregon's abrogation of this "well-established common-law protection against arbitrary deprivations of property" raised a presumption that the amendment violates the Due Process Clause. *Id.* at 430. Concluding that the presumption had not been refuted, the Court stated:

> Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons,

> we hold that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 432.

In *Cooper*, this Court ruled that, in reviewing punitive damage awards to determine whether they are constitutionally sustainable, the appellate courts are required to make a *de novo* review, rather than reviewing for abuse of discretion. Explaining why this heightened standard is necessary, the Court stated that, like standards such as "reasonable suspicion" and "probable cause," the punitive damage standard of "gross excessiveness" is a "fluid concept" that can acquire meaningful content only through case-by-case application at the appellate level. *Cooper*, 532 U.S. at 436.

The requirement of *de novo* review demonstrates why West Virginia's policy of discretionary review is inadequate. *De novo* review requires that the appellate court actually review the record afresh and, where an affirmance is in order, articulate the reason why the award is consistent with Due Process. Where, as in West Virginia, the appellate court is free to refuse even to hear the appeal, the requirement of *de novo* review is simply not met. By declining to review awards of punitive damages, the West Virginia Supreme Court of Appeals also relinquishes the other benefits that this Court identified in *de novo* review: maintaining control of, and clarifying, legal principles through the case-by-case review at the appellate level and unifying and stabilizing precedent by "assur[ing] the uniform treatment of similarly situated persons that is the essence of law itself." *Id.* at 436 (quoting concurring opinion of Breyer, J., in *Gore*, 517 U.S. at 587).

This Court's precedents recognize that the constitutional constraints on punitive damage awards can be ensured only by appellate review. By depriving persons or entities subjected to punitive damage awards of appellate review, West Virginia has effectively insulated such

judgments from the constitutional scrutiny mandated by *Gore* and *State Farm*.

B. The Libel Analog

The importance of appellate review of punitive damage awards has an analog in the area of libel law. Beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court constitutionalized the law of defamation with respect to media defendants. It did so by requiring that public officials and public figures suing a media defendant prove that the defendant published the falsehood in question with "actual malice." *Sullivan*, 376 U.S. at 279-80. This Court has also held that the actual malice requirement must be proven with "convincing clarity."[5]

In its decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 514, which held that the scope of review in libel cases was *de novo* and not limited by Fed. R. Civ. P. 52(a), this Court recognized the importance of appellate review in ensuring that *Sullivan's* constitutional safeguards are followed. As the Court explained:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not

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[5] *Id.* at 285-86; *see Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967).

> merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice." *Id.* at 510-11.

Various studies demonstrate the crucial role that has been played by the appellate courts in ensuring that the *Sullivan* principles are observed. In the earliest years for which statistics are available, an extremely high percentage of libel verdicts were reversed on appeal. For example, it has been reported that 70% to 80% of all jury verdicts against publishers between 1980 and 1985 were reversed.[6] As one commentator said about the high reversal rate during this period:

> Had appellate courts not been able to implement a true actual malice standard, the national media surely would be less vigorous and competitive in bringing information to the public. This high reversal rate demonstrates the tendency of trial judges and juries to disregard the constitutional privilege accorded the press in order to reach more intuitively "fair" verdicts.[7]

For the 1980s as a whole, a somewhat higher percentage of verdicts remained intact. According to the Libel Defense Resource Center (now known as the Media Law Resource Center), 149 libel awards survived post-trial motions during the 1980s. Of those awards, 33% remained intact (*i.e.*, were not appealed or were affirmed) while 67%

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[6] Scott M. Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215, 280 & n.375 (1987).

[7] Gary Anthony Paranzino, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 Cornell L. Rev. 477, 483 (1986).

were modified or reversed on appeal. During the 1990s, 106 libel awards survived post-trial motions; of those, 40% survived intact while 60% were modified or reversed on appeal.[8]

Just as no one would seriously contend that the *Sullivan* standard could have "taken hold" without the assistance of the appellate courts, the constitutional standards announced in *Gore* and *State Farm* cannot be expected to "take hold" without the active assistance of the state and federal appellate courts.

The Academy discusses punitive damages and libel as examples, only. A right to independent review of a fact-finder's initial decision is a necessity to assure application of any constitutional constraints on initial decisionmaking, to bring consistency and predictability to the application of law, to guarantee against arbitrary deprivations of liberty and property, and to promote public confidence in the judicial system as a legitimate branch of a tripartite government.

III. APPELLATE REVIEW PLAYS AN INDISPENSABLE ROLE IN ENSURING THAT LITIGANTS IN STATE COURTS ARE ACCORDED DUE PROCESS OF LAW.

The time has come when at least some category of cases requires nondiscretionary appeal as a matter of due process. The number of states and the number and diversity of their populations have increased; the laws that govern our lives have grown dramatically; the increasing complexity of business and social relations brings to the courts ever more complex issues; the number of filed

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[8] Libel Defense Resource Center, Inc., Press Release: *Trial Records Set in 2002: Highest Media Victory Rate, Lowest Number of Trials* (2003) at http://www.ldrc.com/Press_Releases/bull2003-2.html.

cases has exploded; and more frequently than ever in our history, peoples' lives and fortunes are determined by the courts. Due process requires at least one non-discretionary appeal to permit appellate courts to fulfill their traditional roles of error correction, supervision of inferior courts, and shaping and harmonizing laws, especially in cases such as this requiring enforcement of constitutional limitations on the powers of judges and juries.

Owing to an early ordinance of Edmund Andros, the colonial governor of Massachusetts Bay, the concept of one superior court to which lower courts could appeal was widely copied in the colonial judicial systems of this country.[9] This model mirrored the English system of local courts, each with a right of appeal to some more superior court, which had been part of England's developing common law tradition since the 13th century. It provided a solution to the colonies' need for dispute resolution without travel to courts at great distance.[10] This long history of appeals undoubtedly accounts for every citizen's expectation that if not satisfied at trial, "I will appeal." While this popular response may misunderstand the deference that the appellate process pays to the trial court, it reflects a common understanding that there is the possibility – even the right – to have the merits and process of the trial court be reviewed at least once.

The need for appeals reflects the most important function of appellate courts: the correction of error and the general recognition that the determination of disputes by a sole, fallible human being is not a satisfactory method for resolving disputes, especially where the decisionmaker may be subject to local prejudices or voters' pressure. The

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[9] 1 JULIUS GOEBEL, JR., *Antecedents and Beginnings To 1801*, in THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 13-14 (Macmillan Co. 1971) ("GOEBEL").

[10] GOEBEL, *supra* n.9 at 5.

appellate process gives an appellant the opportunity to identify the error that he believes infects the lower court's decision and to persuade the appellate court, usually including several judges, that the trial court committed reversible error. Oral argument, when granted, gives a litigant the opportunity literally to see an appellate court confront the issues of his case. Even when an appeal does not bring the result the appellant seeks, it gives the loser the satisfaction of knowing that his loss does not depend upon the conclusion of a single judge, and thus brings both repose and a measure of acceptance and confidence in the process.

In some instances, the appellate process also shows the litigant the weaknesses of his case and the experience of hearing the skepticism of the judges as they question appellant's counsel. While disappointing, the realization that thoughtful people who have discussed and reflected upon the case agree with the determination of the trial court brings psychological acceptance of the loss and, eventually if not immediately, acceptance of the judicial process. Roscoe Pound "emphasized that the appeal, if it does nothing else, is necessary to assure the litigants and the public that the judicial power is not vested in a single individual, but is exercised only by a larger institution."[11]

Acceptance of the legitimacy of the entire process is essential to a country that relies so heavily on its state courts to resolve the complex matters that confront society. (As Alexis de Tocqueville observed in 1835, "Scarcely any question arises in the United States which does not become sooner or later, a subject of judicial debate."[12])

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[11] Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 J. L. & Pol. 515, 526 (1999).

[12] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 207 (Oxford Univ. Press 1946). *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*,

(Continued on following page)

While federal case law is often the focus of legal study, "the state courts are the front-line adjudicators in this country, and the amount of appellate work they perform is vastly greater than that done by the federal courts"[13]

Appellate oversight of trial courts brings consistency to the legal system as a whole. In the process of correcting error, state appellate courts play a lawmaking function as they harmonize the decisions within their jurisdictions, and as they fill the "gaps" in the "fissures in the common law"[14] in their published decisions. Through this function private disputes essentially unknown to all but the participants begin to have a broader impact. Publication draws the wider public into debate on the work of the courts. Cases which are appealed include those raising the more challenging legal issues. Disagreement with appellate decisions spawns commentary, both academic and in the political arena, which in turn influences later decisions and legislation.[15] That the appellate courts' lawmaking

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70 N.Y.U. L. Rev. 1, 7 & nn.22-35 (1995) ("Kaye") (describing the staggering variety of tort issues brought before the state courts of New York).

[13] DANIEL J. MEADOR, MAURICE ROSENBERG & PAUL D. CARRINGTON, APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES AND PERSONNEL 3 (The Michie Co. 1994) ("MEADOR"); *see* Edward W. Najam, Jr., *Caught in the Middle: The Role of State Intermediate Appellate Courts*, 35 Ind. L. Rev. 329, 330 (2002); *compare* National Center for State Courts, *Examining the Work of State Courts 2002*, *available at* http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Main_Page.html (caseload statistics) *with* Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, *available at* http://www.uscourts.gov/caseload2002/contents.html (federal caseload statistics).

[14] Kaye, *supra* n.12 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921)).

[15] *See* Burton Atkins, *Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States*, 24 Law & Soc'y Rev. 71, 75-76 (1990).

function is tested in this public debate also reinforces the legitimacy of the process.

An appellate system, like the one in West Virginia, that does not afford litigants at least one appeal as of right in cases subject to constitutional standards and limitations does not guarantee the process due to such a case on appeal. Discretionary review cannot adequately fulfill the obligations of the appellate process.

West Virginia is one of only three states that do not provide for an appeal as of right to all litigants. New Hampshire likewise does not provide for appeals as of right in any case. Virginia's relatively new Court of Appeals and its Supreme Court hear appeals as of right in only specified categories of civil appeals; for most civil cases, there is still no appeal as of right.[16]

Because the jurisdiction of the West Virginia Supreme Court of Appeals is wholly discretionary, litigants in West Virginia – unlike those in 47 other states – are not assured that their cases will be reviewed on the merits by judges who have reviewed the briefs and the record, including the trial transcript, and issued a reasoned decision. As a result, they are deprived of the historical benefits of full appellate review. Commentators have suggested, mistakenly in the Academy's opinion, that the review of a petition

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[16] "*All* appeals to the Supreme Court are discretionary (through the petition for appeal) *except* for appeals from the State Corporation Commission and from a conviction in the circuit court in which a sentence of death is imposed." APPELLATE PRACTICE: VIRGINIA AND FEDERAL COURTS § 1.203A (Hon. R. Terrence Ney, ed., Virginia Law Found. 3d ed. 2003) (emphasis in original). "Appeal will lie *as a matter of right* to the Court of Appeals from a final decision or an interlocutory order granting or denying injunctive relief in the following cases: [three categories, none of which includes civil cases other than domestic relations cases.]. . . . Appeal is discretionary (a party must petition for appeal to the Court of Appeals) from final decisions in . . . criminal convictions by the circuit court." *Id.* § 1.303B (emphasis in original).

in a discretionary jurisdiction is not functionally different from the review and disposition of a routine case in jurisdictions where there is an right of appeal.[17] But a review that is not public and provides no written explanation of its reasoning cannot assure a litigant that the case has been accorded the thorough review sufficient to identify and correct error. As Justice Douglas noted, "once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble."[18]

The lack of "public" view of the appellate process is exacerbated in a jurisdiction that is burdened with such a heavy caseload as is West Virginia. Inevitably, the assumption must be that the pressure of keeping abreast of increasing filings diminishes the likelihood of thorough and considered review.

There are only five judges on the West Virginia Supreme Court of Appeals, which was described in a 1998 report by the National Center for State Courts as "beset by incredibly high caseloads."[19] In 1999, 3,439 petitions were filed, a 10 percent increase over the previous 1991 record of 3,180, creating a caseload that a former Chief Justice of that Court has described as "daunting."[20] On December 1, 1998, the Commission on the Future of the West Virginia Judicial System recommended the creation of an intermediate court

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[17] *See, e.g.*, MEADOR, *supra* n.13 at 1153-54.

[18] *Conversations Between Justice William O. Douglas and Professor Walter F. Murphy*, Transcription of Cassette No. 10: June 9, 1962, *available at* Seeley G. Mudd Manuscript Library, Princeton Univ., http://infoshare1.princeton.edu/libraries/firestonerbsc/finding_aids/douglas/douglas10.html.

[19] Elliott E. Maynard, *West Virginia Needs an Intermediate Appellate Court*, W. Va. L. Rev. 8 (July 2000).

[20] Jennifer Bundy, *State Supreme Court Busiest of Its Kind*, Charleston Gazette, May 1, 1997 at P5A.

of appeals as soon as possible and recommended that each litigant should be guaranteed an appeal as of right at either the intermediate court of appeals or at the Supreme Court.[21] Those recommendations have not been adopted.

The "daunting" workload of the West Virginia Supreme Court affects all aspects of the judicial function. Even the most conscientious judges laboring under such a caseload cannot give adequate attention to the detection of error and the development of case law that is required by an appellate system that accords due process to the cases before it. And while no court is free from error, an example of the danger posed by a judicial scheme that does not allow review of right may be seen in the West Virginia case of *United States v. Flippo*, 528 U.S. 11 (1999). There, this Court summarily reversed a judgment directly conflicting with *Mincey v. Arizona*, 487 U.S. 1230 (1988) (per curiam), where the defendant had been sentenced to a term of life without parole, and the West Virginia Supreme Court of Appeals had unanimously refused review.

Two judges of the West Virginia Supreme Court of Appeals have provided their own reasons why mandatory appeal should be granted.[22] Although speaking about criminal cases where the sentence is life imprisonment without parole, the general tenor of their comments are equally applicable to this and similar cases. Justices Starcher and Albright gave six reasons for their position:

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[21] Commission on the Future of the West Virginia Judicial System, Final Report, Issue 5.1 and 5.1(h) (Dec. 1, 1998), *available at* http://www.state.wv.us/wvsca/Future/Report/contents.htm.

[22] *State ex rel. Penwell v. Painter*, No. 012191 (W. Va. May 1, 2002) (unpublished decision). The Academy has lodged copies of this decision with the Clerk of the Court. We understand that Justices Starcher and Albright routinely use this dissent in cases involving life imprisonment. *See* Russell S. Cook, *In Pursuit of Justice: The Right to Appeal a Life Sentence or Its Equivalent in West Virginia*, W. Va. Law. Rev. 18 (Oct. 2002).

> (1) without full appellate review, convictions do not have any presumption of correctness in subsequent or collateral proceedings;
>
> (2) the Supreme Court of Appeals was deprived of the views of the state Attorney General, who ordinarily offers his views only if review is granted, often resulting in acknowledgement of clear error;
>
> (3) appellate review assures that important issues are brought to the general attention of the bar, which may also invite the participation of *amici* on important issues;
>
> (4) criminal jurisprudence is better reasoned and developed when cases are briefed and addressed in a written opinion, requiring the court to articulate its reasoning;
>
> (5) where appropriate, the court can appoint counsel who can assist with the preparation of a petition because the quality of a petition can affect whether it is granted; and
>
> (6) cases should be argued and briefed where the consequences of error are most extreme.

The loss of liberty is of course the most compelling argument for requiring a direct appeal, but the factors described by two judges, who are familiar with how the West Virginia Supreme Court of Appeals works, apply generally to the case of any litigant whose case is governed by constitutional standards and limitations. Lacking mandatory review, there is no assurance that error has been examined; the appellant does not receive the assurance that the case has been thoroughly scrutinized and considered by judges other than the trial judge; and the bar and the general public are deprived of the opportunity to examine the court's reasoning. The matter is exacerbated if petitions are disposed of with unpublished opinions that do not come to the attention of the wider bar. As a result, error is more likely to go uncorrected, the development of the law is hindered, and it is less likely that the

court's decisions will be discussed and tested by other litigants, legal commentators, and public opinion.

The fact that only three states still maintain a wholly discretionary appellate system by itself casts doubt on the adequacy of such systems. The evidence from caseload statistics, the recommendations of the 1998 Commission on the Future of the West Virginia Judicial System, and members of the West Virginia Supreme Court of Appeals all suggest that the litigants of that state faced with the loss of liberty or substantial property are not being accorded the process now recognized as "due" on appeal throughout America.

CONCLUSION

The Academy urges this Court to grant the petition for a writ of certiorari to the West Virginia Supreme Court of Appeals.

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